

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Jonathan Andrew Arias,

Plaintiff,

vs.

Charles L. Ryan, et al.,

Defendant.

No. CV-15-1236-PHX-GMS (MHB)

**REPORT AND RECOMMENDATION**

TO THE HONORABLE G. MURRAY SNOW, UNITED STATES DISTRICT JUDGE

Pending before this Court is Petitioner's Motion for Authorization to Represent Petitioner in State Postconviction Proceedings; Motion to Stay Federal Proceeding (hereinafter "motion") (Doc. 20). Respondents do not object to the requested stay. (Id. at 3.)

Petitioner filed his habeas petition on July 2, 2015, raising two claims: (1) his sentence to natural life for offenses committed when Petitioner was a juvenile violated the United States Constitution as set forth in Miller v. Alabama, \_\_ U.S. \_\_, 132 S. Ct. 2455 (2012)<sup>1</sup>, and (2) he was not sentenced in accordance with the provisions of his plea agreement. (Doc. 1 at 6-7.) Petitioner raised a claim pursuant to Miller in state court post-conviction

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<sup>1</sup>The Supreme Court, in Miller, recognized for the first time that sentencing juvenile offenders to life without parole, without consideration of certain factors relating to youth, is cruel and unusual punishment under the Eighth Amendment.

proceedings, and the state court found Miller inapplicable to Petitioner<sup>2</sup>, as his natural life sentence was not statutorily mandated, and the court considered the age of Petitioner (16 at the time of the offenses) to be a mitigating factor. (Doc. 1 at 51-54.)<sup>3</sup> The Arizona Court of Appeals granted review and affirmed the trial court's ruling on the merits of Petitioner's claim. (Doc. 1 at 48-50.) Respondents assert that claim one was procedurally defaulted by Petitioner in state court proceedings because Petitioner's claim was presented untimely and in a successive post-conviction petition. (Doc. 17 at 20.)

Petitioner asserts in his motion that the Arizona state courts "should have the opportunity to reconsider [Petitioner]'s *Miller* claim in light of the permanent-incorrigibility standard announced in *Montgomery*." (Doc. 20 at 1.) Petitioner requests the opportunity to petition the United States Supreme Court for a GVR<sup>4</sup> (grant certiorari, vacate and remand), directing that the Arizona state court reconsider Petitioner's case in light of the Montgomery decision.

In Montgomery, however, the Supreme Court did not announce a new standard of "permanent-incorrigibility," as Petitioner suggests. The Court, in its discussion of the substantiveness of Miller's holding (for retroactivity purposes) referenced language from its decision in Miller that a life-without-parole sentence should be reserved for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Montgomery, 136 S.Ct. at 734. The Montgomery Court used interchangeably concepts such as "irretrievable depravity," "irreparable corruption," and "permanent incorrigibility" in its

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<sup>2</sup> The trial court assumed retroactivity in its analysis, although that had not yet been decided. Subsequently, in Montgomery v. Louisiana, \_\_\_ U.S. \_\_\_, 136 S.Ct. 718 (2016), the Supreme Court, on January 25, 2016, made the constitutional right recognized in Miller retroactively applicable to cases on collateral review.

<sup>3</sup>The trial court ruled similarly on Petitioner's petition and on motion for reconsideration.

<sup>4</sup>GVR orders are "premised on matters that [the Supreme Court] has reason to believe the court below did not fully consider." Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 168 (1966) (per curiam).

1 discussion of the retroactivity of Miller, but ultimately concluded that Miller “did not require  
2 trial courts to make a finding of fact regarding a child’s incorrigibility.” Id., at 735. The  
3 Court noted that “[w]hen a new substantive rule of constitutional law is established, this  
4 Court is careful to limit the scope of any attendant procedural requirement to avoid intruding  
5 more than necessary upon the States’ sovereign administration of their criminal justice  
6 systems.” Id. In the end, the Court’s discussion of the holding in Miller was in the context  
7 of determining if that holding should be given retroactive effect under Teague v. Lane, 489  
8 U.S. 288 (1989), with the Court ultimately holding that “Miller announced a substantive rule  
9 of constitutional law,” and thus should be given retroactive effect. Montgomery, 136 S.Ct.  
10 at 736.

11 It is in this context that this Court decides whether to grant Petitioner’s request to stay  
12 and abey his proceedings.

13 Habeas relief is unavailable to a person in custody pursuant to a state court judgment,  
14 unless the applicant “has exhausted the remedies available in the courts of the State.” 28  
15 U.S.C. §2254(b)(1)(A). Generally, “a district court must dismiss habeas petitions containing  
16 both unexhausted and exhausted claims.” Rose v. Lundy, 455 U.S. 509, 522 (1982).  
17 Subsequent to Rose, the Antiterrorism and Effective Death Penalty Act (AEDPA) imposed  
18 a one-year statute of limitations for filing federal habeas corpus petitions. 28 U.S.C.  
19 §2254(d)(1). The Supreme Court recognizes that if a petitioner files a petition in federal  
20 court containing both exhausted and unexhausted claims, in other words a mixed petition,  
21 the combined effect of Rose and the statute of limitation could result in the loss of all claims,  
22 including those already exhausted, because the limitations period could expire while a  
23 petitioner returned to state court to present his unexhausted claims. Pliler v. Ford, 542 U.S.  
24 225, 230-31 (2004). Thus, the Supreme Court has held that the district court has limited  
25 discretion to hold in abeyance a habeas petition containing both exhausted and unexhausted  
26 claims, to permit a petitioner to return to a state court to exhaust additional claims while the  
27 federal proceedings are stayed. Rhines v. Weber, 544 U.S. 269 (2005).

28 In Rhines, the Supreme Court held that a stay and abeyance is appropriate when (1)

1 there is good cause for petitioner's failure to exhaust his claims first in state court; (2) the  
2 unexhausted claims are potentially meritorious; and, (3) there is no indication that the  
3 petitioner has engaged in intentionally dilatory litigation tactics. 544 U.S. at 277-78.  
4 "[E]ven if a petitioner had good cause for that failure, the district court would abuse its  
5 discretion if it were to grant him a stay when his unexhausted claims are plainly meritless."  
6 Id. The stay-and-abeyance procedure "should be available only in limited circumstances,"  
7 consistent with AEDPA's twin purposes: "reduc[ing] delays in the execution of state and  
8 federal criminal sentences" and encouraging petitioners to seek relief from state courts in the  
9 first instance. Rhines, 544 U.S. at 276-77. "Because granting a stay effectively excuses a  
10 petitioner's failure to present his claims first to the state courts, stay and abeyance is only  
11 appropriate when the district court determines there was good cause for the petitioner's  
12 failure to exhaust his claims first in state court. Id.

13 The Rhines' standard does not apply neatly here. First, Petitioner asserts that he  
14 exhausted his Miller claim in state court because "he has invoked one complete round of  
15 Arizona's established review process that is available for such claims, and afforded the  
16 Arizona Supreme Court an opportunity to review that claim." (Doc. 20 at 2.) The trial court  
17 and the Arizona Court of Appeals decided Petitioner's Miller claim after assuming, for  
18 purposes of their analysis, that the holding applied retroactively to Petitioner's case. (Doc.  
19 1 at 48-50, 51-54.) Thus, the Montgomery decision, applying Miller retroactively, will not  
20 likely constitute a basis for the state court's reconsideration of Petitioner's claim. And,  
21 although the trial court noted that Petitioner's post-conviction petition was successive and  
22 untimely (the basis upon which Respondents assert Petitioner's claim is unexhausted ), the  
23 trial court noted that it was filed pursuant to Ariz.R.Crim.P. 32.1(g), which provides an  
24 exception to the preclusion rule when "there has been a significant change in the law that if  
25 determined to apply to the defendant's case would probably overturn the defendant's  
26 conviction or sentence." (emphasis deleted) (Doc. 1, at 53).

27 Furthermore, it is not only speculative, but unlikely that the United States Supreme  
28 Court will find that the standard for a GVR would be met here, as there is no issue to "flag"

1 that the state courts did not “fully consider[.]”<sup>5</sup> The Montgomery decision did not alter the  
 2 holding of Miller; it made the holding retroactive. And, the state court applied the holding  
 3 of Miller in its review of Petitioner’s post-conviction claim.

4 This Court agrees with Petitioner and rejects Respondents’ assertion that Petitioner  
 5 has not exhausted his claim. Before a federal court may grant habeas corpus relief to a state  
 6 prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. §  
 7 2254(b)(1); O’Sullivan v. Boerckel, 526 U.S. 838, 842 (1999); Coleman v. Thompson, 501  
 8 U.S. 722, 731 (1991). The federal court will not entertain a petition for writ of habeas corpus  
 9 unless each and every issue has been exhausted. Pliler, 542 U.S. at 230; Rose, 455 U.S. at  
 10 521-22. To properly exhaust state remedies, the prisoner must have afforded the state courts  
 11 the opportunity to rule upon the merits of his federal constitutional claims by “fairly  
 12 presenting” them to the state courts in a procedurally appropriate manner. Castille v.  
 13 Peoples, 489 U.S. 346 (1989); Baldwin v. Reese, 541 U.S. 27, 29 (2004) (stating that “[t]o  
 14 provide the State with the necessary ‘opportunity,’ the prisoner must ‘fairly present’ her claim  
 15 in each appropriate state court . . . thereby alerting the court to the federal nature of the  
 16 claim.”). A petitioner must describe both the operative facts and the federal legal theory so  
 17 that the state courts have a “fair opportunity” to apply controlling legal principles to the facts  
 18 bearing on his constitutional claim. Id., at 33. In cases not carrying a life sentence or the  
 19 death penalty, claims are exhausted once the Arizona Court of Appeals has ruled on them.  
 20 Swoopes v. Sublett, 196 F.3d 1008, 1010 (9<sup>th</sup> Cir. 1999).

21 Petitioner alerted the state court to the Miller holding in a procedurally appropriate  
 22 manner, that is, by filing for post-conviction relief pursuant to Ariz.R.Crim.P. 32.1(g), which  
 23 provides an exception to the rule against late and successive petitions when “there has been  
 24 a significant change in the law that if determined to apply to defendant’s case would probably  
 25 overturn the defendant’s conviction or sentence.” Although the trial court noted that  
 26 Petitioner’s petition was both “successive and untimely,” it addressed the merits of the claim  
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28 <sup>5</sup>Chater, 516 U.S. at 167.

pursuant to the rule, and, in doing so, presumed the retroactivity of Miller. (Doc. 1 at 51-54.) The Arizona Court of Appeals did not address any timeliness issues, and directly addressed the merits of Petitioner's Miller claim, also presuming, for the purpose of analysis, the retroactivity of Miller. (Id. at 48-50.) In determining whether a state court applied a procedural bar, this court "reviews the "last reasoned opinion" of the state court. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991). The Arizona appeals court's decision on the merits is the last reasoned opinion in Petitioner's case, as the decision was summarily affirmed by the Arizona Supreme Court. (17-1 at 69.)

Thus, Petitioner's claim one is exhausted, and therefore, Petitioner's habeas petition is not mixed and a request for a stay and abey should be denied.

### CONCLUSION

For the foregoing reasons, this Court finds that Petitioner's habeas petition is not mixed, and therefore there is no cause, pursuant to Rhines v. Weber, 544 U.S. 269 (2005), to stay and abey the proceedings, or to authorize the Federal Public Defender to represent Petitioner in state court post-conviction proceedings. Wherefore, this Court will recommend that Petitioner's Motion for Authorization to Represent Petitioner in State Postconviction Proceedings; Motion to Stay Federal Proceeding, (Doc. 20), be denied.

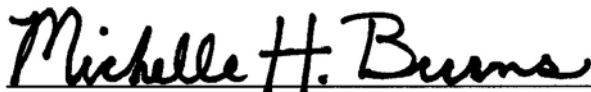
**IT IS THEREFORE RECOMMENDED** that Petitioner's Motion for Authorization to Represent Petitioner in State Postconviction Proceedings; Motion to Stay Federal Proceeding, (Doc. 20), be **DENIED**.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections

1 to the Report and Recommendation may not exceed seventeen (17) pages in length.

2 Failure timely to file objections to the Magistrate Judge's Report and  
3 Recommendation may result in the acceptance of the Report and Recommendation by the  
4 district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121  
5 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any factual determinations of the  
6 Magistrate Judge will be considered a waiver of a party's right to appellate review of the  
7 findings of fact in an order or judgment entered pursuant to the Magistrate Judge's  
8 recommendation. See Rule 72, Federal Rules of Civil Procedure.

9 DATED this 16th day of March, 2016.

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12 Michelle H. Burns  
13 United States Magistrate Judge  
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